Review Panel on Common Law Relationships

Hon. A.C. Hamilton Q.C. LL.D.

Interim Opinion on Adoption

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When the Review Panel on Common-law Relationships was established on June 21, 2001 by the Honourable Gord Mackintosh, the Minister of Justice and Attorney General of the Province of Manitoba, he sought the advice of Jennifer A. Cooper Q.C. and myself on several issues.

As we began to write our report on the various topics, we found that, although we agreed on many matters, we disagreed on others. We had difficulty trying to reflect our differing positions in one report and finally concluded that we could more clearly express our opinions and recommendations if we submitted separate reports.

That possibility was discussed with the Deputy Minister and he suggested two interpretations of the issues, and separate opinions, might be even more beneficial to government than one. We are therefore submitting separate reports.

The Minister initially asked us to report to him by the 31st of December, 2001, but he has now asked us to expedite our report on Adoption and submit it as an Interim Report. The following is therefore my own opinion of the problems with the Manitoba *Adoption Act* and what might be done to correct them. I will continue to use "we" to indicate the tasks we performed together.

The terms of reference indicate the issues we were to examine, what we were to report on, and to some extent, how we were to proceed. They stated:

> *Government seeks your advice on a series of issues respecting persons in common-law relationships. The Province of Manitoba maintains a policy of non-discrimination in the application of provincial statutes. Concerns recently have been raised that a number of statutes may need to be addressed in terms of their fairness to and potentially discriminatory effect against members of the gay and lesbian community in Manitoba.*
>
> *In the development of your advice, you have full access to all relevant employees within the Department of Justice (Manitoba), should you find that such access may be helpful to you in providing advice to government. You may also consult with experts in relevant areas of the law. Any legislation resulting from your advice will result in full public hearings which will permit any member of the public to address the issues under consideration by the legislature. For that reason, public hearings are unnecessary at this stage, and are not contemplated under these terms of reference. However, you may consult with interested individuals or groups, if you feel it would be helpful to do so. It is important to*

emphasize that proceeding with despatch and in a focused way is a critical element of these terms of reference.

Your advice should be provided to me by or before the 31st of December, 2001. To ensure a transparent process, and public accountability, these terms of reference and any subsequent amendments that may be requested by you are, and will continue to be, publicly available. Your advice will be made public as well.

The issues for which government seeks your advice are as follows:

Adoption

1. *As they apply to adoption applications by same sex common-law couples, are the provisions in Manitoba's Adoption Act likely to survive a Charter challenge?*

2. *The best interests of the child is the paramount consideration in any adoption proceeding. If Manitoba's Adoption Act is not likely to survive a Charter challenge, review legislative approaches in other Canadian jurisdictions, identify models (legislative approaches) which would comply with the Charter and recommend a preferred approach.*

Conflicts of Interest and Protection of the Public Interest

3. *A number of Manitoba statutes contain conflict of interest provisions, including those affecting public officials. Are amendments recommended to these conflict of interest provisions and other provisions to protect the public interest to include persons in common-law relationships, where those persons are currently excluded? If so, what approach is recommended?*

4. *One or both persons in a same sex common-law relationship may not be open with family, friends, co-workers and others about their sexual orientation. Some persons in opposite sex common-law relationships may also have concerns about open disclosure. If amendments to conflict of interest provisions are recommended, then how should these changes be reconciled with the privacy rights/interests of both persons in a common-law relationship?*

Legislation dealing with Property Interests

5. *Taking into account legislative developments across Canada, particularly in Saskatchewan and Nova Scotia, recommend an approach to addressing rights and duties of common-law partners in legislation that gives married spouses an interest in and right to inherit/share their spouse's property.*

Like the Terms of Reference, the *Adoption Act of Manitoba* emphasizes the needs of children.

Section 2 of the Act states:

> The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interest.

Section 3 expands upon that principle:

> All relevant factors shall be considered in determining the child's best interests, including
>
> (b) the child's opportunity to have a parent-child relationship as a wanted and needed member of a family;
>
> (e) the child's sense of continuity and need for permanency with the least possible disruption;

The *Adoption Act* deals with a number of different kinds of adoptions under numbered Divisions. Division 1 deals with permanent-ward adoptions, where a Child and Family Services Agency (CFS) has already placed a child with foster parents pursuant to its authority under an Order of Guardianship. This is often referred to as a "closed adoption" or the "traditional" method where CFS selects and recommends an individual or couple to adopt a specific child. The birth parents are not told who the adopting individual or couple is.

Division 2 applies to private adoptions and Division 3 applies to the adoption of children in a foreign jurisdiction where they are brought to Canada through an immigration process. Division 4 relates to *de facto* adoptions. It permits the adoption by guardians of a child who has lived with them for at least two years. Extended family adoptions are dealt with in Division 5 and apply to the adoption of a child who is related to the applicant. Parents own Adoptions in Division 6 applies to someone who has married or has entered into a committed relationship with the parent of a child and Division 7 applies to the adoption of one adult by another.

It is difficult to follow the provisions of the Act as it is first necessary to properly identify the category that applies to a particular case and then to see what requirements and limitations apply.

The first thing we did as we entered upon our responsibilities was to invite people to send us their comments and suggestions on the various issues. We published a notice and request for comments in urban and rural newspapers throughout the province and received a good number of replies. The replies served two purposes. They provided us with a cross-section of opinion and enabled us to identify those with whom we would like to meet.

Our second task was to arrange a number of private meetings and to invite a representative number of individuals and organizations to discuss their thoughts and recommendations with us. We invited those we believed had a similar point of view to the same meeting so we could

discuss their perspectives free from any discussion or argument from those who might have some basic disagreement with them. We were anxious to avoid some of the confrontations and bitterness that was evident in the committee meetings.

We also invited some we were sure would have first-hand knowledge of how the adoption system operates, to meet with us. We had developed a number of questions and tentative concerns and wanted the opportunity to explore them with people who are actively involved in administering the Act. We wanted to learn of their concerns if they were prepared to share them with us. Everyone we invited, who was available, came to a meeting and graciously discussed the issues with us. After the in-person consultations were completed we made a number of long distance conference calls to discuss our terms of reference with national organizations that have staff studying the issues and intervening in Supreme Court of Canada and other cases.

While the plans for meetings were being put in place we considered the state of the law and read the transcripts of the oral presentations that were made to the Standing Committee on Law Amendments on June 18th and 21st, 2001 and the written submissions that had been filed with it.

The consultations we held and the submissions we received were of value as they provided a considerable amount of information we would not otherwise have had and provided us with a wide variety of strongly held opinions. As will be seen, they played an important role in the formulation of my own opinions and recommendations.

When discussing adoption and other matters, we heard a number of comments on whether Manitoba should establish a system that would permit common-law partnerships to be registered. As that issue relates primarily to property matters, although it might have some implication for adoption, I will leave my commentary on that subject for my final report.

Consultations

All the initial consultations and inquiries were conducted jointly with Ms. Cooper. Following is a summary of the comments and opinions I found to be of particular significance. They include a number of divergent opinions and views, but some similarity as well, particularly on what is best for children.

The method of consultation we followed allowed us to explore each issue and to discuss the opinions that were expressed, in some detail. There was no rancour during any of our meetings and everyone we spoke with was anxious to see government proceed in a fair and appropriate manner. I was pleased to see that each consultant expressed a concern for what is best for children. Most discussed all the topics that were referred to us but, in this interim report, I will only comment on what they said about adoption.

One woman who wrote to us had worked with children, fostered many, and has four of her own. She felt quite strongly that no changes should be made to Manitoba's *Adoption Act*. In addition to her moral considerations, her experience was that children hate to be different from other children. She said that an adopted child often feels different enough without adding further pressures. She believes that same-sex relationships are not normal and feels very disturbed to think of being adopted with no say in the matter, by a same-sex couple, so she would not submit anyone else to such a situation. I took her comments as a plea for and on behalf of children.

The main concern of two women who are in positions of public responsibility with whom we discussed the disclosure and conflict of interest questions, was that joint adoptions by same-sex partners are important as they can provide children with the same rights of support and succession enjoyed by the children of married couples.

We spoke with those who have strong traditional lifestyles and believe in the sanctity of marriage. They believe that all children need a father and a mother and that they are the ones who should be adopting children. They recognize that marriages are breaking down and that alternate lifestyles are becoming more common, but do not want government to do anything that would encourage the breakdown of traditional marriages or that would encourage another lifestyle.

It was necessary on occasion to advise some with whom we spoke that any single adult may now apply to adopt a child, no matter what their sexual orientation may be and that it is only same-sex couples that may not. We had to do that as some felt that no gay or lesbian person should be entitled to adopt at all. Two women to whom we spoke did soften their opposition a bit by agreeing that two sisters of a deceased relative should be able to provide a home for a child and be able to jointly apply to adopt, but they maintained their opposition to gay or lesbian adoptions.

The opposition to gays and lesbians that I perceived was really to the life style they believed gay and lesbian people have, without any particular understanding of what that may include. They of course did not hear gay and lesbian people speak, as we did, of their long-term stable relationships. Nor did they hear of their sensitivity to the needs of children and the large numbers of children now being raised in their homes.

A Manitoba lawyer who is a Board member of Adoption Options, spoke to us. That organization assists young mothers or pregnant women who are thinking of putting their child up for adoption. The mothers are given information about possible adoptive parents and have an opportunity to meet with them and to assess their ability to provide a good home. In effect, they select the adoptive parents. They may also enter into an 'openness agreement' that will give them the right to receive photographs and reports on how the child is doing. Some even include opportunities to visit with the child from time to time.

His focus was on the welfare of children who are adopted by only one member of a same-sex partnership. He was concerned about what would happen if the partners separated. He said:

> "The "non-legal parent" would be at a huge disadvantage in seeking custody or access as against the "legal parent". The presumption that a child is to benefit equally from both "parents" after separation would become a farce and again expose the child to the potential of a protracted court battle."

He asked how this could possibly be in the best interests of the child. Children's rights, he said, should be the same for all whose "parents" are married or are same- or opposite-sex partners."

He also said that if the government is of the view that the placement of children in the homes of gay or lesbian couples is bad for children, then the government should explicitly say so and make the practice illegal. He said that by permitting the placement of children in gay or lesbian households, and then declining both partners the right to call themselves parents, the law is engaging in a practice that is intellectually dishonest.

We spoke to two representatives of labour who had obviously looked at the issues on behalf of their members, had discussed them in considerable detail, and had received direction from their members as to the position the unions should take. They said they would like to see changes to the law that would permit common-law partners, whatever their sexual orientation, to adopt children. They suggested that the sole criteria when selecting adoptive parents, should be what is best for the child.

In an earlier written submission, the Canadian Labour Congress had taken the position that "gay and lesbian people are every bit as capable of being loving caring parents." The Manitoba Federation of Labour recognized the diversity of its members and also urged that all be treated with fairness and equity.

The Children's Advocate advised us that gay and lesbian people are more likely to adopt children with special needs. The chairperson said that the adoptive parents should understand that, when they are given the responsibilities of adoption, the law is saying: "these are your children now" and there should be government financial support and other support services in place to assist them with their difficult responsibility.

We spoke to a woman who was raising her three teen-age children with her same-sex partner. She said the children were well adjusted and she and her partner make certain they have a male

influence in their lives. She said the children have adjusted to the fact that they have two mothers who love and care for them. The couple helps the children understand their particular relationship and has been able to make them comfortable with it. When the children were younger they were encouraged to say whatever they wanted about their "parents" or not to discuss it with their friends until they were older. The couple adapted their approach to the sensitivities of each child.

Others told us of some of the difficulties resulting from the fact that only one partner is officially recognized by the school and medical authorities and to problems that could arise when a consent is needed in a hurry. We did not hear of any actual problems but same-sex partners are concerned that they could arise. Same-sex couples wish to be recognized as equal partners and have equal responsibilities. Although they cannot marry, these women would like to regularize their relationship as much as possible, and in particular, would have liked to have been able to adopt their children as a couple.

We heard a great deal about the impact of the Supreme Court decision in *M. v. H.* on the law. We were told that the Manitoba Bar Association has passed a resolution asking the Government of Manitoba to eliminate all distinctions between same-sex and opposite-sex common-law partners. The members of the Bar we met said they would prefer to see government make the necessary changes, rather than seeing their members and their clients having to challenge the existing law in court.

The majority of those with whom we spoke suggested the decision as to whether a certain person or persons should be able to adopt a child, should be made by a child welfare agency or by a judge, on the basis of what is in the best interests of the particular child.

Many we consulted were anxious to see all children have all the benefits that can flow from an adoption. People on both sides of the question said that children who are adopted should receive the same rights and benefits from those raising them that they would have from natural parents. That should be the case, they said, whether those raising them are single, married, or are same- or opposite-sex partners.

Two openly gay presenters spoke of the caring personality of many gay men who are now involved in parenting children, in one way or another. They suggested that 1 in 10 gay men and every 3 or 4 lesbian women are now raising children. Many have children of their own that are now being raised by a same-sex couple. The only change that is desirable from the standpoint of a couple, and from the position of the children, they said, is to permit both partners to join in adoption applications and to become the official parents of the children they raise.

The Manitoba Human Rights Commission, after a very informative meeting, forwarded a summary of its recommendations. On the topic of adoption it said:

> "We recommend that *The Adoption Act* be amended so that gay or lesbian couples can apply together to adopt or foster a child, and so that the non-biological parent in a same-sex couple can adopt his or her spouse's child."

The Commission also made several other recommendations:

> "Amendments should be drafted in a manner that is respectful of the dignity of gay and lesbian persons in relationships, and their families, and recognizes these relationships as equal with opposite-sex relationships.
>
> Irrespective of the approach favoured by the Panel with respect to any future amendments to *The Adoption Act*, any reference to common-law partners within the adoption process should include both same- and opposite-sex partners.
>
> We recommend that *The Vital Statistics Act* be amended to allow for both the biological parent and the co-parent in a same-sex common-law relationship to register as parents.
>
> We also recommend that *the Vital Statistics Act* be amended so as to extend to same-sex common-law partners the same rights currently enjoyed by opposite-sex common-law partners to register their child with the last name of either partner, or a hyphenated combination of both parents' last names."

We reviewed the carefully researched report of the Manitoba Association of Women and the Law that had been presented to the government. Its contents were discussed by us with its representatives at our first meeting. They raised many issues that we subsequently explored with other presenters. We also heard from the Rainbow Coalition and their suggestions are included in those I attribute to individuals.

The Executive Director of EGALE made some interesting comments in the written material we received after we spoke to him by telephone. It said in part:

> "The terms of reference for the Panel on Common Law Relationships make clear that "the Province of Manitoba maintains a policy of non-discrimination in the application of provincial statutes. This commitment is consistent with Manitoba's inclusion since 1987 of "sexual orientation" in its human rights legislation as a prohibited ground of discrimination. It is also consistent with the constitutional obligation shared by all governments in Canada to ensure that the laws of each jurisdiction correspond with the equality guarantees of the *Charter of Rights*."

An officer of Focus on the Family in British Columbia advised that their concern is the family. Their approach is based on Christian principles and they believe in monogamous heterosexual relationships. He said that they have two positions on same-sex adoptions:

> "Position 1 Non-legally married people should have no right to adopt. They should apply for guardianship.
>
> Position 2 Adoption should be based solely on the best interests of the child."

His personal feeling was that he would have to agree to giving the same rights to same-sex and common-law couples. He makes no distinction between opposite and same-sex arrangements. He subsequently advised that he had contacted the Vital Statistics office in British Columbia and was informed that while most birth certificates refer to a "father" and "mother", in the case of same-sex adoptions, the names are changed to "parent" and "parent".

REAL Women of Canada in their written submission to us said:

> "The social movement by same sex couples to adopt children, as couples, is the seeking *inter alia* of the court's approval of same-sex sexual practices. Such a movement is about same-sex couples' interests, not the interests of children.
>
> It is our view that the Manitoba *Adoption Act* cannot be amended to apply to same-sex couples because it is not legally possible within the legal and constitutional framework of adoption law. This framework is the Prerogative law of the *parens patriae*, the sovereign's guardianship, maintenance and protection of children...."

The person we spoke to on the phone also said:

> "Yes, there are long waiting lists of children waiting for adoption. Children should not have succession rights. They can get welfare."

While I disagree strongly with these sentiments I feel obliged to pass them along to government. I will refrain from identifying the person to whom we spoke in the hope that her comments do not reflect a corporate policy.

We met with three senior Child and Family Service administrators who have had extensive experience in child welfare work and in finding suitable people to adopt the many children who have had to be removed from their birth parents. They spoke of their inability to find enough adoptive parents, particularly for older children and those with special needs.

When people apply to adopt a child, a CFS agency undertakes a detailed examination of their background and arrives at an opinion as to whether they are able to properly care for and raise a child. If a same-sex couple applies to adopt they are advised that only one of them can be the official applicant but that the suitability of both partners will be examined. If an agency approves a single applicant and supports their application to adopt a particular child, an application is made to Court and again only one applicant is shown as applying to adopt the child.

If an Order of Adoption is made by a judge, only the one same-sex applicant is named as the adoptive parent. From that day on that person is the official parent of the child and has the rights and obligations of a natural parent.

They emphasized that every adoption applicant is judged on his or her ability to care for a child and they do not approve a gay or lesbian person any more quickly than any other applicant. They make the same inquiries and apply the same criteria when assessing their suitability. On the other

hand, they do not reject a gay or lesbian person or couple solely on the basis of their sexual preference.

The administrators were familiar with adoptions that have been processed under the direction of their agency. Follow-ups have shown some excellent same-sex situations in which the adopted child is doing well and is benefiting from the love and attention of two people of the same sex. Even more significant is the fact that they have found "some beautiful gay and lesbian families."

They volunteered that, in their experience, people in same-sex relationships are no more promiscuous than partners in other arrangements. They pointed out that there is a need, throughout the province, for adoption applicants and they look beyond the stereotypes and look at their applicants as individuals.

In passing, they mentioned that there are a number of matters every adoptive parent has to deal with. They have to be sensitive to the needs of their children and tell them that they are adopted, and the nature of their own relationship. That should be done, they said, before a child is 12 and the door to a discussion should even be opened after age 6 to let the children ask questions if they want to. They urge same-sex couples to do the same.

They stated that they come as close to approving same-sex couples as adoptive parents as the law permits and that they plan to continue that practice. Whether the existing law is changed or not, it would make no difference to their present practice.

Following our meeting, one of the CFS representatives sent us a copy of some of the rules that were published in the Manitoba Gazette that apply when the suitability of an applicant is being examined. A social worker, when doing a home study report on adoption applicants must cover the following matters, which I list in summary form:

Biographical data on the applicant, their family and those living with the applicant.

Present relationships with them and any children of a previous relationship.

Past marriages or relationships.

Ability to parent a child with special needs or from another culture.

The stability of the person and the effect of adding a child to the family.

Lifestyle, including involvement in neighbourhood, leisure and social activities.

Description of the home and community.

Description of the child who may be placed with them.

Wishes with respect to an openness agreement, a contract veto and a disclosure veto.

An evaluation of the suitability of the person to assume the responsibilities of a parent.

A recommendation as to whether the person should be approved for the placement of a child.

Any other relevant factors.

As I did not fully understand the significance of the openness agreements referred to in the directive, I phoned and asked the person who had forwarded the material to give me some further information. Apparently openness agreements are quite varied. Some applicants are not comfortable with them at all while others agree to send some information to the birth mother or grandparents. This may take the form of an occasional letter or photograph. Some adoptive parents stop sending photographs as the child grows up for fear that he or she might be identified and demands to see the child in person might commence or escalate.

The *Adoption Act* says that these agreements may be in writing, and may contain a method of resolving any dispute that may arise, but that is apparently not done in practice. The existence of an openness agreement is merely noted in the CFS file.

It seems that openness agreements are more often used in the adoption of Aboriginal children. The adoptive parents are more likely to appreciate the importance of having the child maintain a connection with his or her extended family and with Aboriginal culture and traditions. Aboriginal social workers and Aboriginal communities are comfortable with that arrangement.

I explored the comment made during our in-person meeting that it did not matter to Child and Family Services whether the law is changed or not. The person I spoke to said that the intent of that remark was only to indicate that CFS now examines the capacity of both same-sex applicants to parent a child, even though only one can legally adopt. Child and Family Services nevertheless believes that the system would be improved, and that it would be better for children, if same-sex couples could jointly adopt a child.

I have recently been in touch with a recognized expert in California who has done a number of longitudinal studies that followed children of divorced parents for years to assess the impact of their parents' separation on them as they grow up. She advised me that, while there is a considerable amount of writing on the subject, no similar studies have yet been done to track children raised by same-sex couples.

She did say that the research to date shows that children raised by a gay parent do not become gay themselves and that children raised in gay households, by and large, are doing well. She said that some children do experience discrimination as they get older, depending on the degree of tolerance for same-sex relationships in the community where they live. She said that is not a problem in California.

As I conclude my recital on the various comments and suggestions we heard, I must say that I was concerned about the attitude of some that denigrated those who hold a different opinion. Some seem to feel that those on the other side of the debate are strange and unacceptable

members of society while some others feel that those who oppose their request for equality are bigots without any understanding of or compassion for others. These comments were not expressed openly to us but there was certainly strong disagreement on what should or should not be done by government. It may be that my conclusion on the extent of the disagreement was occasioned more by the animosity displayed during the committee hearings.

I believe that the people we are talking about in this study are those who would be found to be suitable adoptive parents by an agency and by a judge. The gay and lesbian people we spoke to impressed me as concerned and responsible citizens who want to do their part in improving society and in helping children are in need of a good home. They wanted no special privileges, only the same opportunities as other citizens.

Society is obviously divided on the rights same-sex couples now have, or that should be accorded to them, and I regret that others were unable to hear the manner in which opinions were expressed to us. Unfortunately, there is a wide gulf of misunderstanding between those on the extremes of the debate. I was bothered by the gulf and by the dichotomy but I found some comfort in one of the cases that was referred to us.

In **Mossop v. Canada [1993] 1 S.C.R. 554**, at page 634, Madam Justice L'Heureux-Dubé of the Supreme Court of Canada said:

> "It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values. ... {I}t is in society's interest to improve conditions to enable families to function as best they can, free from discrimination."

Case Law

M. v. H. [1999] 2 S.C.R. 3,is a decision of the Supreme Court of Canada. The case was heard by a full court of nine judges. The written decision of the majority was delivered by Cory and Iacobucci JJ. with Major and Bastarache JJ. writing concurring opinions, Gonthier J. dissenting. The Attorney General of Ontario had been given leave to appeal although the motions judge and the Ontario Court of Appeal had ruled in favour of the individual parties. Eight national organizations were granted status as interveners.

The case considered the wording of Section 29 of the *Ontario Family Law Act* and whether it was in conflict with the *Canadian Charter of Rights and Freedoms*.

At the time the case went to court, Section 29 provided:

> 29. "In this Part,
>
> "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

Section 1(1) said in part:

> "spouse" means either of a man and woman who
>
> (a) are married to each other, or
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.
>
> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

M and H were women who had lived together in a same-sex relationship for ten years and had their own business. After their separation, one commenced a court action seeking the partition or sale of their home and an order of support under the *Family Law Act*. The portion of the definition of "spouse" that I have underlined, seemed to bar the application.

The Supreme Court found that Section 29 of the *Family Law Act of Ontario* was unconstitutional as it infringed Section 15(1) of Schedule B, Part I of the *Constitution Act, 1982*, entitled "*Canadian Charter of Rights and Freedoms*" which provides:

> "Everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The Court held that the definition of "spouse" in Section 29 of the Ontario *Family Law Act* violated the provisions of Section 15(1) and was discriminatory. It discriminated against same-sex partners by conferring certain rights, similar to those of married couples, upon unmarried opposite-sex couples, while denying the same rights to unmarried same-sex couples. Section 29 was declared to be of no force and effect.

Some of the Court's findings were:

> "The proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter*, as set out in *Law*, requires the court to make the following broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristic? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage.
>
> The central question of this appeal is whether the differential treatment imposed by the impugned legislation on an enumerated or analogous ground is discriminatory within the meaning of s. 15(1). This inquiry is to be undertaken in a purposive and contextual manner, focussing on whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect to perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.
>
> ...The exclusion of same-sex partners from the benefits of s. 29 promotes the view that M and H and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.

> Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.
>
> ...It is thus apparent that the legislation has drawn a formal distinction between the claimant and others, on the basis of a personal characteristic, namely sexual orientation. Sexual orientation has already been determined to be an analogous ground to those enumerated in s. 15(1) of the *Charter.* "

The Supreme Court also found that the discrimination in Section 29 was not saved by Section 1 of the *Charter*, which provides:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Some of the comments of the court on that Section were:

> "The first stage of the justification test under s. 1 of the *Charter*, as outlined in *Oakes*, asks whether the legislation limiting a *Charter* right furthers a pressing and substantial objective. Where a law violates the *Charter* owing to under inclusion, this stage is properly concerned with the object of the legislation as a whole, the impugned provisions of the Act, and the omission itself. The purpose of the *FLA* (Parts I to IV) is to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down.
>
> ... Providing for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent spouses, are pressing and substantial objectives. These objectives promote both social justice and the dignity of individuals, which are values that underlie a free and democratic society."

On the point of sexual orientation being an analogous ground to those listed in Section 15, the Supreme Court, in **Egan v. Canada [1995] 2 S.C.R. 513**, confirmed that sexual orientation falls within the ambit of Section 15 protection as being analogous to the enumerated grounds.

La Forest J. said at page 528:

> "I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds. "

At page 530 he quoted from comments made by McIntyre J. in **Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143**, at p. 165:

> "In other words, the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less burdensome impact on one than another. "

He also referred to what McIntyre J. said at p. 174:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. "

M. v. H. is also of interest in Manitoba as it adopts the description of a "conjugal relationship" that appeared in an earlier case. That term is used in Manitoba's Bill 41 and should be taken as having the following meaning. At page 59 of his reasons, Cory J. comments:

> ***"Molodowich v. Penttinen*** **(1980) 17 R.F.L. (2d) 376** (Ont. Dist.Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".
>
> Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true for same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely. In these circumstances, the Court of Appeal correctly concluded that there is nothing to suggest that same-sex couples do not meet the legal definition of "conjugal"."

It is also important, when considering Manitoba legislative changes, to recognize how limited the Supreme Court decision in *M. v. H.* actually was. Cory J., at paragraph 52 of his reasons said:

> "These observations on the structure of the FLA serve to emphasize that this appeal has nothing to do with marriage *per se*. Much of the FLA is devoted solely to regulating the relationship that exists between married persons, or persons who intend to be married. They alone are guaranteed certain property rights that are not extended to any unmarried persons. In some specific instances - such as Part III dealing with support obligations – the legislature has seen fit to extend the rights and obligations that arise under the FLA beyond married persons to include certain unmarried persons as well."

At paragraph 55 he said:

> "It is thus apparent that in this appeal there is no need to consider whether same-sex couples can marry, or whether same-sex couples must, for all purposes, be treated in the same manner as unmarried opposite-sex couples. The only determination that must be made is whether, in extending the spousal support obligations set out in Part III of the FLA to include unmarried men or women in certain opposite-sex relationships, the legislature infringed the equality rights of men or women in similar same-sex relationships, and if so, whether that infringement may be saved by sec 1 of the *Charter*."

Although *M. v. H.* deals with support obligations, and not adoption, and is carefully limited in its scope, it is safe to conclude that the principles that it articulates would be applied in a similar manner to any and all statutory provisions, no matter what the subject matter of the statute might be. Similar distinctions would, I do not hesitate to say, be found to be contrary to the *Canadian Charter of Rights and Freedoms* if they discriminate on the basis of sex or sexual orientation.

A recent case has gone farther than *M. v. H.* and has considered the validity of legislation that differentiates between the rights of married and same-sex couples to adopt a child.

S.C.M. and N.J.C., 2001 NSSF 24, is an oral decision of Madam Justice Gass of the Supreme Court of Nova Scotia, Family Division. She found that the adoption provisions of Nova Scotia's *The Children and Family Services Act*, which prohibit the adoption of children by same-sex couples, was discriminatory and contrary to the *Charter*. The Act contained a number of limitations. The judge severed the offending portions and read-in additional wordings to enable same-sex partners to adopt. She read-in the words 'common-law partners' and other wordings to make the statute apply and awarded the applicants an order of adoption. In effect, she concluded that same-sex couples have the same right to adopt children as do married couples.

Two women had lived in a conjugal relationship since 1987 and went through a ceremony of commitment in 1991. One of them had two children with an anonymous sperm donor and in October 2000 the partners jointly applied to adopt them. The Minister of Community Services and the Attorney General of Nova Scotia initially contested the application but within a month of when the trial was due to commence, they advised the applicants and the court that they were no longer opposing the application, although they were not consenting to an Order of Adoption. In other words, they were leaving the decision up to the court.

That turn of events was significant as the judge, although she found that the failure to include same-sex partners in the Statute was discriminatory under Section 15 of *The Charter*, did not deal with the Section 1 issue, holding that:

> "Once it has been established that the impugned legislation infringes the *Charter*, the onus then shifts to the party seeking to uphold the legislation, to prove that such infringement is demonstrably justified in a free and democratic society.
>
> Because the government is not opposing the application, it has not justified the discrimination."

Most of the evidence dealt with the needs of children and the ability of the applicants to parent. The judge decided that "there is no justification for depriving these children of the right to be part of a legally recognized family relationship because of their parents' sexual orientation."

The learned judge found that the legislation offended Section 15(1) and made the following comments:

> "Only married couples can jointly apply to adopt. Thus persons such as the Applicants are unable to adopt children conceived by their partners and born into the relationship. While the law applies to all non-married couples, whether heterosexual or of the same sex, there is a clear distinction in that gay and lesbian couples are not legally permitted to marry. Thus the legislative requirement that only married person may jointly adopt, results in discrimination, not just on the basis of marital status but also of sexual orientation (p. 7).
>
> It is clear that while one parent is the biological parent, the other is, in all respects, the spouse of that parent and the psychological parent to these two children. Thus I conclude that the law prohibiting them from jointly adopting their children violates their rights and freedoms under s. 15(1) of the Charter (p. 8.)
>
> There is no prohibition against a single gay or lesbian person adopting a child. There can be no justification under the Act for prohibiting a same-sex couple who meet all the criteria (except for their marital status) from doing so as well (p.10).

In view of the implied consent of the government, and the onus the judge applied, it appears to me that the judge gave insufficient attention to the fact that the case went farther than *M. v. H.* and dealt with a comparison between the rights of married people and same-sex couples, while the Supreme Court of Canada only compared same-sex and opposite-sex couples.

If there had been argument supporting the validity of the legislation on both the Section 15 issue and on the implications of Section 1 of the *Charter*, the result might have been different. If the Ministers of the Crown had participated and raised these issues, the court might have concluded that the legislature was entitled to make the distinction it did.

I do not raise this decision for the purpose of criticizing it, but to advise the Government of Manitoba that is not binding on it, and that I advise against accepting it as established authority. If the Supreme Court of Canada eventually considers a similar issue, its decision would be binding on the courts in Manitoba and should be followed by the legislature.

While the case may be an indication of judicial interpretation yet to come, it is impossible to conclude at this time that common-law couples, whether opposite-sex or same-sex, have to be afforded the same rights as married people.

We were told that there are broader challenges starting to work their way through the courts, but as there have been no fully argued and binding decisions on point, I am unable to comment on what the judges hearing those cases might decide. All I can say at the moment is that same-sex and opposite-sex couples must be treated alike.

Quite apart from *Charter* cases dealing with legislation, there is a considerable amount of judicial writing on the appropriateness of gay and lesbian people caring for, raising and adopting children. The following cases indicate the manner in which some judges are receiving and adopting expert evidence that indicates that same-sex partners can provide and have been providing good homes for children.

These cases are not binding in Manitoba either but they do indicate a trend that is developing in reported cases and should be kept in mind by the Government of Manitoba when considering extending adoption and other rights to same-sex partners and to all children. It can reasonably be anticipated that similar cases and similar evidence will be presented to the courts in Manitoba.

A(Re) (1999) 2 R.F.L. (5th) 358, is a decision of November 26, 1999 in which Martin J. of the Alberta Court of Queen's Bench, while granting an order of adoption of two natural children to the applicant's same-sex partner, commented on the importance of adoption to children. The judge said, at page 8 of the decision:

> "It is also important to remember that adoption provides significant benefits to a child as adoptive children have legal rights which are not available to children who are not formally adopted. Examples of rights which arise by virtue of a legally recognized parent/child relationship may be found in the Intestate Succession and the Fatal Accidents Act (both cited). It is reasonable and just that children of same-sex couples have the same legal rights associated with private adoptions as have children of heterosexual couples. There is also a significant emotional benefit to both the child and the adoptive parent in having legal recognition of their relationship, and that too should be available to a child of a same sex couple."

The judge also relied on "the results of extensive scientific research relating to same-sex couples and the experience of children raised by them" given in evidence by a Dr. Froberg:

> "Children raised in lesbian-headed families do not suffer systematically on factors such as gender identity, gender role behaviour, sexual orientation, intellectual

ability, psychological or social functioning from those raised in two-parent or single-parent heterosexual families and typically do not experience high levels of stigmatism due to having two mothers.

The child development literature has concluded that, rather than any one particular family structure, what children require to develop in a healthy fashion is a stable, empathic, consistent, nurturing relationship with at least one care-giving adult in which the child and adult(s) become attached to one another.

Lesbian women are no less committed to the role of mother nor any less able to function effectively in this role than are heterosexual women and often strive to create strong families which do not differ systematically from heterosexual families on any of the factors noted above.

Lesbian families tend to score highly on the factors which lead to high relationship satisfaction, e.g., egalitarian values, equal sharing of household duties, and often find that their stress is buffered by social support networks which they make a conscious effort to cultivate.

The literature pertaining to the best interests of the child has noted how comforting and security-enhancing it is for children to feel a part of a "forever family" and that their belonging to a particular nuclear and extended family unit is legally recognized, supported and will be protected under conditions of adversity such as death, disability or dissolution of the relationship."

The court also relied on a report from Dr. Jon Amundson, a clinical psychologist and a recognized expert in child and family psychology, which said:

> "The psychological research generally does not support any scientific basis for discrimination against homosexuals with regard to fitness to parent. The fitness and suitability of gay and lesbian parents or foster parents needs to be considered on a case by case basis, as it is for heterosexual parents."

The Supreme Court of Canada case of **Chartier v. Chartier [1999] 1 S.C.R. 242**, when dealing with the concept of *in loco parentis*, makes some interesting comments on adoption and the needs of children. Bastarache J., speaking for the Court, shared the view of Bealieu J. in **Siddall v. Siddall (1994) 11 R.F.L. (4th) 325** at page 23, part of which states:

> "In too many of these situations the ultimate result is that the child is a mere object used to accommodate a person's selfish and personal interests as long as the relationship is satisfying and gratifying. As soon as things sour and become less comfortable, the person can leave, abandoning both the parent and the child, without any legal repercussions.... It is important to encourage the type of relationship that includes commitment, not superficial generosity. If relationships are more difficult for a person to extricate him or herself from then, perhaps, more

children will be spared the trauma of rejection, bruised self image and loss of financial support to which they have become accustomed."

Bastarache J. states later:

> "Some concerns may also be raised with regard to the relevance of adoption proceedings where obligations regarding all "children of the marriage" are identical under the *Divorce Act* and *The Family Maintenance Act*. I recall that Mr. Chartier did not finalize his plans to adopt Jessica. The simple answer to that is that legal adoption will nevertheless have a significant impact in other areas of the law, most notably trusts and wills; it retains its importance...
>
> Once it is determined that a child is "a child of the marriage" within the meaning of the *Divorce Act*, he or she must be treated as if born to the marriage. As the Quebec Court of Appeal held in ***Droit de la famille*** – 1369, [1991] R.J.Q. 2822 (Que. C.A. at p. 2827)
>
> > [Translation] "Once the status of a child of the marriage is recognized, the Act does not allow the distinction to be made between a biological father and someone who stands in the place of one."

The law is now quite clear. Opposite-sex common-law couples and same-sex common-law couples must be treated the same way. Neither can legislatively receive a benefit the other does not receive.

Advice and Recommendations

Issue No. 1.

The first question in the terms of reference was whether the provisions of the *Adoption Act of Manitoba* would withstand a challenge advanced under the *Canadian Charter of Rights and Freedoms.*

To comply with the Supreme Court of Canada decision in *M. v. H.*, the *Adoption Act* will have to be amended to remove the rights and benefits now given to opposite-sex common-law partners or to provide the same rights to same-sex partners.

I describe the options in that way because the Supreme Court has not said that it is impossible to legislatively distinguish between the rights of married people and the rights of those who are not married.

The Supreme Court's practice is to not go beyond the facts of the case that is before it and the legal issues those facts raise. It may therefore be years, if ever, before the Supreme Court deals with the question of whether common-law partners are entitled to the same rights as married people. Legislation may intervene, as the provinces can make that sort of change if they wish. The question of whether gay or lesbian people may marry has also yet to be litigated and, as marriage is a federal matter, the federal government can legislate on that topic if it decides to do so.

Because the question was not before it, the Supreme Court, in *M. v. H.* carefully refrained from commenting on whether common-law couples have the same rights as married people. It also clearly declined to discuss the question of whether same-sex people are entitled to marry one another.

As it would be turning the clock back to remove the rights of opposite-sex common-law couples to adopt, when there is such a need for adoptive parents, I assume that it would be preferable to institute the second option and provide the rights now available to opposite-sex partners to same-sex partners as well. In the belief that the Manitoba government will prefer that approach, my subsequent comments will be based on that premise.

I might add that none of those we consulted suggested taking the existing right of opposite-sex common-law couples to adopt away from them. Nor did many suggest that only married couples should be entitled to adopt. While the question of a single person adopting was not addressed in detail, some said that it is preferable for a child to have a mother and a father.

I mention these matters at this point, as I did when discussing the case law, to indicate why I am reluctant to speculate on what the courts or legislatures will do in the future. The Supreme Court has nevertheless, in quite a number of cases, indicated its opinion on the importance of the family and the individual rights of all Canadians to the protections and benefits spelled out in the

Charter. It is reasonable to suggest that the Court will likely continue in that vein and their pronouncements on ancillary matters should be considered in Manitoba.

Recommendation No. 1.

My opinion and advice is that a number of the sections of the *Adoption Act of Manitoba* would not withstand a *Charter* challenge and will have to be amended.

Issue No. 2.

As I discuss possible amendments, I will put forward wordings to make my intent as clear as possible, but I recognize that the government's legislative counsel may prefer different phraseology and may wish to make additional changes to clarify or simplify some of the sections.

I begin my recommendations on amendments to the Act with the one I consider to be of greatest significance. If a statement is made near the beginning of the Act that any two people or adults are entitled to have a child placed with them for the purposes of adoption and are entitled to receive an Order of Adoption, and if that statement is not contradicted by subsequent provisions in the Act, that could have a considerable affect on the manner in which the Act is written.

A number of the troublesome sections I will later refer to will have to be deleted, but others could also be amended in a more substantial manner than I will suggest. The Act could even be entirely re-written and simplified if the basic requirements were the same for all divisions or categories. The need for divisions might not even be necessary. I will not press the point further but do suggest that some of the detailed changes I propose may not be necessary.

Section 10 of the *Adoption Act* now provides:

> "An adult who resides in Manitoba may apply to adopt a person in accordance with this Act."

That provision, as it stands, should be a sufficient indication of who may apply to have a child placed with them for purposes of adoption, and who may become an adoptive parent. The words "an adult" included "adults" as Section 19 of the *Interpretation Act* provides:

> (i) words in the singular include plural, and words in the plural include singular.

That definition unfortunately does not apply throughout the *Adoption Act* at the present time as any two adults may <u>not</u> apply to adopt. Later sections of the Act contradict Section 10 and establish other criteria. The reason why all adults may not adopt is because a number of sections

state that the applicant(s) must be of the opposite sex to the parent, must be related by blood or marriage, or be a man and woman who are not married.

Even if the subsequent sections are amended, I suggest that Section 10 be amended in any event to make it absolutely clear that any two common-law partners may jointly apply to adopt.

When drafting how this contradiction might be corrected, I have considered the terminology used by other provinces when indicating who may apply to adopt. Some are quite precise while others remain vague.

I would recommend against following the manner in which Saskatchewan has made its amendments. It has amended its *Adoption Act* to provide:

> "Clause 2(1)(p) of the Adoption Act is repealed and the following substituted:
>
> > 'spouse' means the legally married spouse of a person or a person with whom that person is cohabiting as spouses."

The same wording is applied to other domestic relations and property-related statutes in Saskatchewan. In my opinion that clause is not clear and may still require judicial interpretation or clarification.

Nova Scotia has not amended its Adoption Act since *M. V. H.*, as have other provinces. While its Act contains some interesting provisions that I will deal with in another part of my final report, there is nothing that I can recommend in its Act that deals with who may apply to or adopt a child.

The best examples of an acceptable statement that I have seen are found in the British Columbia and Newfoundland legislation.

The British Columbia Adoption Act has allowed same-sex couples to adopt jointly for a number of years. Section 5(1) of its Adoption Act, R.S.B.C., 1996, c.5, provides:

> "Who may receive a child for adoption
>
> 5(1) A child may be placed for adoption with one adult or two adults jointly."

Newfoundland has amended its Adoption Act to permit both stranger and step-parent adoptions. Section 20 of the Adoption Act, SN 1999 c. A-2.1 provides:

> "Who may apply to adopt
>
> 20(1) One adult alone or 2 adults jointly may apply to a court to adopt a child under this Act."

Several, including some law professors, urged us to recommend that the Ontario three-tier adoption scheme not be adopted in Manitoba. Ontario has also chosen to re-define "spouse". Along with an analogous definition of "same-sex partner", a number of statutes state:

> "spouse" means a person of the opposite sex,
>
> (a) to whom the person is married, or
>
> (b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,
>
> (i) have cohabited for a least one year,
>
> (ii) are together the parents of a child, or
>
> (iii) have together entered into a cohabitation agreement under section 53 of the Family Law Act;

The majority of those who discussed wordings with us preferred the British Columbia and Newfoundland approach. I also recommend that those wordings, or something similar to them, be used in Manitoba as they are clear and concise and leave no doubt about the ability of opposite and same-sex couples to adopt. The clearer and more precise legislative provisions can be, the greater their certainty and the freer they will be from the need for judicial interpretation.

I believe that Section 10 of the Manitoba Act, as it is now worded, should be sufficient to indicate who is entitled to apply to have a child placed with them for the purpose of adoption, as well as to adopt a child. Out of an abundance of caution however, I suggest a more precise wording. In this wording I do not refer to the right "to have a child placed with them for the purpose of adoption" as I believe that right will be inferred if an applicant has the right to adopt. Legislative counsel will of course select a wording they think is appropriate.

Recommendation No. 2.

Delete Section 10 of the Adoption Act and substitute therefor:

Any adult who resides in Manitoba, alone or jointly with another, may adopt a person in accordance with this Act.

Issue No. 3.

Section 1 of the Act contains definitions that are supposed to apply throughout the Act:

> "extended family" includes, in addition to the persons in the definition of "family", aunts, uncles and cousins of a birth parent, a spouse of any of those persons, and any unmarried adult who is cohabiting in a relationship of some permanence with any of those persons of the opposite sex who is an unmarried adult;

> "family" means a child's parents, step-parents, siblings, grandparents, aunts, uncles, cousins, any person *in loco parentis* to the child and the spouse of any of those persons;

There is no definition of the terms "common-law partner" or "common-law relationship" but if those terms are to appear in an amended statute they should be defined and the same definitions should be used in other statutes as well. The term "family" also appears in property-related statutes and the definition should either be included in all statutes or the term should be defined in the *Interpretation Act* so that it would apply to every statute in the province. The problem with having too much covered by the *Interpretation Act* is that it is not usually consulted by those wanting to find out what a specific Act contains.

The definition of "extended family" as it is now defined would not survive a *Charter* challenge as it limits those covered by it to "persons of the opposite sex---" It is a discriminatory provision akin to that dealt with by the Supreme Court in *M. v. H.*

The problem becomes evident in the reference to "extended family" in Section 76 which says that a person who is entitled to surrender guardianship of a child "may place a child with a member of the child's extended family for the purposes of adoption". The definition of "extended family" limits the section to opposite-sex common-law couples.

Although it is not a matter directly referred to us, I question the accuracy of the definition of "extended family" as it applies to Aboriginal people. It would be well to examine it in consultation with an Aboriginal historian if the intent is to widen the scope of "family". My understanding of the Aboriginal use of the term is that it includes people who are not related by blood, or where that lineage may be difficult to prove. I understand that it may include a member of an Aboriginal community who is called or looked upon as a grandparent, parent, cousin, brother or sister, even though they may not technically fall into any of those categories. Adding the clause "or a spouse of" any of the enumerated relatives adds little to the definition and does not include the other "non-relatives" I have mentioned.

The term "*in loco parentis*" in the definition of "family" does not broaden the scope of "extended family" although it may refer to some common-law spouses of natural parents. A person *in loco parentis* is a person who is not related to the child, directly or by marriage, but stands in the place of a parent and has been acting as a parent toward the child. In my opinion more specific language is required if the definitions are to apply to common-law partners.

I suggest that these issues be examined to make sure they reflect the government's intent to include people who do not fall within the normal definition of family, although I do not include these suggestions as a formal recommendation.

I do however recommend that the *Adoption Act* make it absolutely clear that those entitled to have a child placed with them for purposes of adoption, and the right to become adoptive parents, applies to everyone whether they are married, are common-law couples of the same or opposite sex, or whether they are a single applicant.

In my opinion the initial definition of "common-law partner" that I recommend is sufficient, but if some should think it is not sufficiently precise, or if the government wishes to make its intent absolutely certain, my alternate definition of "common-law partner" could be used.

Recommendation No. 3.

Amend Section 1 of the Adoption Act in the following ways:

(1) By adding the following definitions:

(a)"common-law partner" means a person who is living with another in a conjugal relationship.

OR

"common-law partner" means a person of the same or opposite sex who is living with another in a conjugal relationship.

(b) "common-law partnership" means two persons who are living together in a conjugal relationship."

(2) By amending the definition of "extended family"

by adding after "spouse" the words "or common-law partner" and by deleting all the words after "persons" in the second last line.

(3) By amending the definition of "family"

by adding, after the word "spouse", the words "or common law partner".

Issue No. 4.

When discussing how statutes might be amended to comply with *M. v. H.*, all the lawyers urged us to recommend against redefining the word "spouse" to have it include a common-law partner. We did not discuss that sort of detail with those who were opposed to same-sex adoptions, but I feel secure in saying they too would be opposed to seeing that term being given any other than its present meaning, namely - the other married partner.

I also recommend against expanding the definition of "spouse". It is not necessary to do that in order to grant adoption and other rights to common-law partners. Such a move would also raise the ire of those who support the sanctity of a traditional marriage to which the term "spouse" relates.

It is preferable, where it is necessary to extend a right now given to a spouse to those in a common-law relationship to add, after the word "spouse" the words "or common-law partner". That would result in the right in question being accorded to all common-law partners.

Recommendation No. 4.

I recommend that the term "spouse" not be changed or re-defined, but that, where appropriate, "or common law partner" be added after "spouse" in each case where the government wishes to extend the rights of a spouse to a common-law partner.

Issue No. 5.

Section 36 of the Adoption Act now provides that only the following may apply to have a child placed with them for the purposes of adoption.

> Where
>
> (a) a husband and wife
> (b) a man and a woman who are not married but are cohabiting as spouses; or
> (c) a single adult;
>
> desire to have a child who is a permanent ward placed in their home with a view to adopting that child, they may make an application to the child and family services agency having jurisdiction in the area where they reside for the purpose.

Subsection (b) implies that an unmarried couple, comprising a man and a woman, are to be treated as if they were married, so they may apply to have a child placed with them, but the wording limits the provision to "a man and a woman" so two people of the same sex are excluded. Subsection (c) makes it clear that a single person, without regard to their sex or sexual orientation, may also apply to have a child placed in their home.

This subsection would not withstand a *Charter* challenge because subsection (b) provides the opportunity for common-law couples made up of a man and a woman to commence adoption proceedings. The result is that it prohibits a same-sex common-law couple from adopting.

In the language of *M. v. H.*, it is discriminatory and contrary to the equality guaranteed by Section 15 of the *Charter*. It discriminates on the basis of sex and sexual orientation.

If my Recommendation No. 1 is followed, none of subsections (a), (b) or (c) need be included in the statute. If it is not deleted, the following would cure the problem.

Recommendation No. 5.

Amend the Act by deleting section 36(b) and substituting "common-law partners".

Issue No. 6.

Section 73(1) of the Act provides:

> An application for an order of adoption may be made in the prescribed form:
>
> (a) jointly by a husband and wife or by a man and woman who are not married but are cohabiting as spouses, where at the time of the application is made
>
> (i) they are jointly caring for an maintaining the child, and
> (ii) either applicant has had care and control of the child and has maintained the child for at least two consecutive years; or
>
> (b) by a person who at the time of the application is made
>
> (i) is caring for and maintaining the child, and
> (ii) has had care and control of the child and has maintained the child for at least two consecutive years.

This section is in the same category as Section 36 as it limits the right to opposite-sex couples. It would not withstand a *Charter* challenge as it excludes same-sex couples.

Recommendation No. 6.

Amend Section 73(1) of the Act by deleting paragraph (a) and substituting therefor:

(a) jointly by a husband and wife or common-law partners, where at the time the application is made

Issue No. 7.

The present heading to Division 6 refers to the adoption by a person who has married a child's parent. To have it apply to all common-law couples it should be amended.

Recommendation No. 7.

(1) Amend the heading of Division 6 that precedes Section 88 to say:

ADOPTION BY PERSON WHO HAS MARRIED OR IS THE COMMON-LAW PARTNER OF A CHILD'S PARENT

Issue No. 8.

Section 88 (b) now provides:

> A person who
>
> (a) is married to the parent of a child; or
> (b) is cohabiting with the parent of a child and is of the opposite sex to the parent;
>
> may, together with that parent or alone but with the consent of that parent, apply to the court in the prescribed form to adopt the child if the child is living with the applicants and is being cared for by them.

This is another section that would not withstand a *Charter* challenge.

Recommendation No. 8.

Delete Section 88(b) and replace it with:

(b) "is a common-law partner of the parent"

Issue No. 9.

Section 94(1)(a) now provides:

> A judge may make an order of adoption of an adult without the consent of anyone, except the person to be adopted as long as
>
> (a) the person adopting is older by a reasonable number of years than the person to be adopted; and
>
> (b) the reason for the adoption is acceptable to the judge hearing the application.

This section provides that a judge may make an order of adoption as long as "the person adopting is older by a reasonable number of years than the person to be adopted". In my opinion that provision could be challenged under the *Charter* as it discriminates on the basis of age. I see no rationale for the provision. There may be circumstances where a younger person might wish to adopt an older person to provide needed protection and support. If the offending words are removed, or if the section did not exist at all, the judge would still be able to consider whether the particular application should be accepted.

Recommendation No. 9.

Delete Section 94(1)(a).

Issue No. 10.

The declaration of commitment that adoption applicants have to sign appears as form AA-14 in Regulation 19/99 made pursuant to the *Adoption Act*. It contains the following clause:

> "2. We have been living together as though husband and wife continuously since the _____ day of _____, _____, and we are currently living together and intend to live together as though husband and wife on a permanent basis."

This implies an opposite-sex relationship and, if amendments are made to the Act itself, it would be contrary to its intent and its provisions.

Recommendation No. 10.

Amend paragraph 2 of the form by deleting the words "as though husband and wife" where they appear in the first and last lines.

Issue No. 11.

I was intrigued to hear of the "openness agreements" that are explored by certain organizations and agencies. Although the Act provides for such agreements to be in writing, it appears that most agreements are oral in nature and are not always honoured. Some agreements, I was told, have to remain flexible in the future to suit the wishes of the parties and their comfort level in communicating with one another.

The agreements usually call for the provision of information on how the child is doing by way of letters and photographs and some include visits with the child. Some permit continuing contact by grandparents. The Act provides that ways of settling disputes can be contained in a written agreement.

Continuing contact between a parent and a child can sometimes be beneficial for the child. This is particularly true where an Aboriginal child is being adopted by people from another culture. Opikihiwawin is an organization in Winnipeg that offers advice and support to non-Aboriginal parents who have adopted Aboriginal children. It places significant emphasis on keeping the children connected with their culture and with their extended families.

If more formal openness agreements are deemed to be appropriate, consideration might be given to permitting a judge to put conditions on an Adoption Order by setting out the terms of future contact that are to apply. If a judge makes some continuing contact a condition of an Order of Adoption, or makes another Order at the same time, it would likely be taken seriously by the adoptive parents, would not be as easily ignored, and could be enforced by the court.

When on the bench I often heard from psychiatrists that as children of separated parents grow older they are anxious to know something of the missing parent. In some cases the child may have a pressing psychological need to know that parent and has a feeling of loss or emptiness if there is no contact. If information on a missing parent is not forthcoming, I was told that a child often places the missing parent on an undeserved pedestal. Expert witnesses suggested that it is often best to encourage some contact between the child and the missing parent so the child can make his or her own realistic assessment of the person.

I am not pressing this recommendation as a number of issues and people would have to be considered before a final decision is made. I do make it however as the government has expressed its concern for the best interests of children.

Recommendation No 11.

I recommend that consideration be given to permitting a judge, when making an Order of Adoption, to include reasonable conditions to ensure some continuing contact between a birth parents and the child.

Issue No. 12.

When a judge makes an Order of Adoption where the applicants are of the same sex, we presume the judge will merely name them as the adoptive parents. There is however a potential problem when the Order reaches the Vital Statistics office. Section 10(9)(b) of the *Vital Statistics Act* provides that the names of the adoptive "parents" shall be shown as being the parents of the child, but at the moment the practice is to name them as "mother" and "father".

The Vital Statistics office has not yet had to deal with how it would name same-sex adoptive parents as that is not now permitted, but neither has it been asked to register an adoption from another province, like British Columbia, that does permit same-sex adoptions. I suggest that if the Manitoba law is amended to permit them, a policy be established as to how same-sex adoptive parents are to be designated at Vital Statistics. It may be that an additional form will have to be added in the Regulations to accommodate same-sex parents.

Apparently the Director of Vital Statistics has to record the sex of the new parents for statistical purposes, but I suggest that the new certificate of birth show each same-sex adopting person as "parent" as in British Columbia. It would, in my opinion, be easier for a child to say that he or she has two "parents", rather then two mothers or two fathers. Those terms might be embarrassing to a child in later years when a certificate of birth has to be produced.

Recommendation No. 12.

I recommend that the birth certificate issued under the Vital Statistics Act following an adoption show same-sex parents by adoption as "parent" and "parent".

Final Remarks

I would like to thank those who came and spoke with us and shared their experience and knowledge of the adoption system. Their names, and the names of their organizations, will be shown in a schedule to my final report. I thank Joan MacPhail Q.C. and others in the Department of Justice who provided information on what Manitoba and other governments in Canada have done to meet the challenges raised by the Supreme Court. I had to do a great deal of reading to familiarize myself with all the issues, but my task was considerably eased by the guidance I found in the material provided my Ms. MacPhail.

In my opinion, the Supreme Court of Canada has done the country a favour by raising the same-sex question, that is currently under consideration in Manitoba, to one of fairness and legality. It has approached a very delicate topic on the basis of principle. It has reminded us of the need for tolerance and respect for the differences that exist in society. The Court has shown us that the world is changing and that the law must react to those changes in a responsible manner. It has dealt with the rights of each person as guaranteed by the *Canadian Charter of Rights and Freedoms*.

It is not necessary for me to "take sides" on the issues I have examined, although I heard strong positions expressed on the question of gay and lesbian rights. I have tried to follow the lead provided by the courts and to arrive at my conclusions and opinions in this interim report that are also based on Justice and the Rule of Law.

All of which is respectfully submitted at Winnipeg, Manitoba, this 29th day of October 2001.

Hon. A. C. Hamilton Q.C. LL.D.

Schedule A

List of Recommendations

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List of Recommendations

Recommendation No. 1.

My opinion and advice is that a number of the sections of the Adoption Act of Manitoba would not withstand a *Charter* challenge and will have to be amended.

Recommendation No. 2.

Delete Section 10 of the Adoption Act and substitute therefor:

Any adult who resides in Manitoba, alone or jointly with another, may adopt a person in accordance with this Act.

Recommendation No. 3.

Amend Section 1 of the Adoption Act in the following ways:

(1) By adding the following definitions:

(a) "common-law partner" means a person who is living with another in a conjugal relationship.

OR

"common-law partner" means a person of the same or opposite sex who is living with another in a conjugal relationship.

(b) "common-law partnership" means two persons who are living together in a conjugal relationship."

(2) By amending the definition of "extended family"

by adding after "spouse" the words "or common-law partner" and by deleting all the words after "persons" in the second last line.

(3) By amending the definition of "family"

by adding, after the word "spouse", the words "or common law partner".

Recommendation No. 4.

I recommend that the term "spouse" not be changed or re-defined, but that, where appropriate, "or common law partner" be added after "spouse" in each case where the government wishes to extend the rights of a spouse to a common-law partner.

Recommendation No. 5.

Amend the Act by deleting section 36(b) and substituting "common-law partners".

Recommendation No. 6.

Amend Section 73(1) of the Act by deleting paragraph (a) and substituting therefor:

(a) jointly by a husband and wife or common-law partners, where at the time the application is made

Recommendation No. 7.

Amend the heading of Division 6 that precedes Section 88 to say:

ADOPTION BY PERSON WHO HAS MARRIED OR IS THE COMMON-LAW PARTNER OF A CHILD'S PARENT

Recommendation No. 8.

Delete Section 88(b) and replace it with:

(b) "is a common-law partner of the parent"

Recommendation No. 9.

Delete Section 94(1)(a).

Recommendation No. 10.

Amend paragraph 2 of the form by deleting the words "as though husband and wife" where they appear in the first and last lines.

Recommendation No 11.

I recommend that consideration be given to permitting a judge, when making an Order of Adoption, to include reasonable conditions to ensure some continuing contact between birth parents and the child.

Recommendation No. 12.

I recommend that the birth certificate issued under the Vital Statistics Act following an adoption show same-sex parents by adoption as "parent" and "parent".